

Section 623(b)(8)(A). The latter Section specifically cross-references Section 623(b)(7)(A) in stating that a cable operator "may not require the subscription to any tier other than the basic service tier required by paragraph (7)."³⁶ By referring back to paragraph (7), paragraph (8) indicates that cable operators have the discretion to require a forced buy-through of the basic service tier described in paragraph (7). Consequently, the paragraph (7) "requirement" would only be a requirement if the cable operator itself decides to impose such a requirement in the exercise of its rights conferred by paragraph (8).

Even under the Notice's tentative interpretation of the Cable Act, which requires a buy-through of the basic service tier in order to obtain any other tier, a consumer would nevertheless and in all instances be able to purchase an a la carte program service or pay-per-view programming without having to subscribe to the basic service tier. In this regard, Viacom also believes that a consumer could purchase a package of otherwise a la carte services without a forced buy-through of the basic service tier. Packaging a la carte services together does not either transform them into a "tier" or change their character from a la carte for purposes

³⁶ Cable Act at § 623(b)(8)(A). The use of the word "required" in Section 623(b)(8) does not itself create a forced buy-through of the basic service tier; rather, it refers back to the "required" used in paragraph (7).

of Section 623(b)(7)(A), at least where the cable operator continues to offer them separately.³⁷ Such an application of the Act would elevate form over substance because a consumer would be required to subscribe to a basic service tier in order to receive a package of a la carte services but would be able to purchase as many of these services separately as he desired without having to purchase the basic service tier.

B. Packages of Premium Program Services That Are Also Made Available On An A La Carte Basis Are Not Regulated Under the Cable Act

Viacom agrees with many commenters that a package of premium program services that are also available on a given system on an a la carte basis are not a "cable programming service" under Section 623(c) and thus are not subject to rate regulation. Such a package offering does not and cannot hurt consumer interests, because consumers who choose to do so may purchase one or more program services individually rather than as part of a group. Indeed, such a grouping can serve the public interest by offering programming on a discounted basis and by increasing subscribership, which in turn allows costs to be recovered from a larger customer pool resulting in lower prices.

³⁷ But see Reply Comments of Viacom International Inc., MM Docket No. 92-262 (Tier Buy-Through Provisions) at n.1 (Jan. 28, 1993) (one program service can constitute a "tier" for purposes of the anti-buy-through provision).

Viacom agrees with the general consensus reflected in the comments that channels grouped or "multiplexed" by a programmer to provide common programming on essentially a "time-shifted" basis are not subject to rate regulation because they are effectively one program service.³⁸ Therefore, even though such channels of the same program service may not be offered separately, they constitute one program service which would not be a "cable programming service" and thus would not be subject to rate regulation.

Therefore, Viacom urges the Commission to reject those comments that would, in the name of stringent rate regulation, harm programmers and consumers by constraining the ability of the cable industry to offer premium program services in ways that meet consumer demand, permit discounted pricing, and increase subscribership.

VI. CONCLUSION

For the foregoing reasons, Viacom International Inc. respectfully urges the Commission to adopt cable rate regulation policies that allow cable operators to recover their programming, system expansion, and government-mandated

³⁸ See *CFA Comments* at 12-16; *Discovery Comments* at 12-16.

costs, and that preserve the flexibility of the cable industry to meet consumer demand.

Respectfully submitted,

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